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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DENNIS HENRY HUDSON, Defendant and Appellant.	G036641 (Super. Ct. No. 05WF1953) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Jennifer A. Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Raymond M. DiGuiseppe, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found Dennis Henry Hudson guilty of receiving stolen property (Pen. Code, § 496, subd. (a))[1]. Hudson admitted he served two prior prison terms — one for forgery and another for identity theft. The court sentenced Hudson to five years in state prison (three for the current conviction and one for each prior prison term), but suspended that sentence and placed him on three years of formal probation. On appeal Hudson contends the court erred by denying his request for a continuance to obtain medical records, and coerced the jury's guilty verdict. We disagree and affirm the judgment.

FACTS

Between 11:00 a.m. and 12:00 noon on July 5, 2005, Phuong Cil, a resident of an apartment complex, placed outgoing mail in her mailbox. Three envelopes contained checks to pay bills and one was addressed to the Social Security Administration.

Around 1:00 p.m. that same day, Jon Valez, a resident of a nearby complex, placed outgoing mail in his unlocked mailbox, expecting the mailman to arrive between 2:00 p.m. and 4:00 p.m. The apartment complex was "open to the street" so "anyone can just walk in there." The six envelopes contained checks to pay bills.

Neither resident authorized anyone to take the envelopes. All but one of the envelopes bore return address labels identifying the sender.

At 5:15 p.m. that evening, Officer Sweasy, responding to a report of "a suspicious subject . . . with a razor blade," arrived at an alleyway located within 100 yards of both apartment complexes. Other police officers were already there. (One of the officers testified for the defense that Hudson appeared to be "picking" at his "various

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[1] All statutory references are to the Penal Code.

cuts and abrasions" with a razor blade. The officer had responded to a report of a "subject . . . in the alley possibly cutting himself.") Hudson was seated on the ground near a razor blade and a Dumpster; he was shirtless and had open sores. With Hudson's consent, Sweasy searched him and found 14 envelopes in his pants pocket. The envelopes were stamped and sealed, and in good condition; they bore no postmarks. When the officers "held the mail up to the sunlight, [they] were able to see some checks" inside. In response to Sweasy's questions, Hudson said he found the mail in the Dumpster and did not know what was inside the envelopes, but if there were checks, he "would probably contact a friend of a friend and get a hundred dollars for it." Hudson stated he was in the alley to clean his sores in private, had removed his shirt and put it in the dumpster, and in doing so had found the mail. "He knew it didn't belong to him, but he took it anyhow."

DISCUSSION

The Court Did Not Err by Denying Hudson's Request for a Continuance

Hudson contends the court violated his rights to due process and effective assistance of counsel by denying his request for a continuance to obtain medical information and thereby "requiring unprepared counsel to proceed." He asserts the medical information would have helped establish his sole defense "that due to his mental illness" he did not know "the letters in his pocket were stolen." He claims "the court incorrectly determined evidence of [his] mental illness was irrelevant to the crime of receiving stolen property" and abused its discretion by failing "to properly weigh and consider relevant factors."

Hudson was represented by counsel at his July 7, 2005 arraignment, and continuously thereafter. Stacy Kelly, his trial counsel, first appeared on his behalf at a trial setting conference on August 12, 2005. Trial was set for over a month later on

September 19, but on that date Hudson's motion for a continuance was granted and trial set for September 26. On September 26, Kelly could not answer ready for trial as she was "trailing for trial on another case," but indicated she would be ready on October 3. Hudson did not wish to waive his right to a speedy trial, spoke with an alternate defender who could not "announce ready" that day, and then asked to represent himself. The court advised Hudson to review overnight the *Faretta*[2] form explaining "all the dangers and consequences in representing" himself. The next day Hudson informed the court his mother had traveled from Chicago to testify on his behalf and could not afford to stay another week. Ultimately, Hudson agreed to waive time with the understanding trial would be set for October 3.

On the morning of October 3, defense counsel and the prosecutor were "ready to go," and Hudson indicated he wanted "to go forward with the jury trial." After further proceedings, however, defense counsel requested a continuance based on the following information she had received that morning: Hudson was a manic depressive; he and his mother wanted to testify he had not taken his prescribed medicine on the day of the incident; he did not realize the mail was stolen because the medicine can "reduce or stop" symptoms such as "confusion, hallucinations, frightening or unusual thoughts"; he was currently taking the medication, having been prescribed by a doctor at the jail and was first diagnosed with the condition 12 years earlier.

The court denied Hudson's motion for a continuance, stating inter alia: "[T]his is something that should have been explored long before the point where we're at now. [T]here was no evidence to support or corroborate that in terms of medical opinion concerning his effects, any medication or non-medication . . . . I think it's confusing, and . . . I have some concerns on the relevancy of it. Especially this being a general intent crime. [¶] [I]n looking at the CALJIC, *People versus Reyes* [(1997) 52

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[2] *Faretta v. California* (1975) 422 U.S. 806.

Cal.App.4th 975], 'evidence of intoxication is admissible to show absence of knowledge, and if the evidence is sufficient, the defendant is entitled to instructions thereon.' [¶] But here it's very vague in terms of your offer of proof, and especially in light of the defendant's statements to the police officer afterwards, there's nothing to indicate that any type of depression or medication or lack thereof was involved in this crime."

Section 1050 governs continuances in criminal cases and mandates that criminal cases "be set for trial and heard and determined at the earliest possible time." (§ 1050, subd. (a).) Therefore, in a criminal case, a continuance may "be granted only upon a showing of good cause." (§ 1050, subd. (e).) "A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "'[T]he trial judge . . . must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 972; see also § 1050, subd. (g)(1) [the only statutorily specified factor is that "the court shall consider the general convenience and prior commitments of all witnesses, including peace officers"].) "Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary." (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.)

"The trial court's denial of a motion for continuance is reviewed for abuse of discretion." (*People v. Jenkins, supra,* 22 Cal.4th at p. 1037.) "'Discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered.'" (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) "'In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, "'particularly in the reasons presented to the trial judge at the

time the request [was] denied.'"'" (*Ibid.*) The defendant bears the burden of showing an abuse of discretion. (*People v. Jeffers*, *supra*, 188 Cal.App.3d at p. 850.)

Here, the court did not abuse its discretion by denying Hudson's motion for a continuance. The court allowed extended discussion on the motion and considered all appropriate factors before denying it. As to the first factor, i.e., Hudson's anticipated benefit from a continuance, the court identified such benefit when it stated the only possible relevance of the medical evidence was to show Hudson lacked knowledge the property was stolen. As to the second factor, i.e., the likelihood Hudson could gather evidence showing he lacked knowledge the property was stolen because of hallucinations, frightening thoughts, or the like, the court noted Hudson made no "statements like that" to the police at the time of the incident and also concluded Hudson's offer of proof as to potential expert testimony was vague and thin. Regarding the third factor, i.e. the burden on other witnesses, jurors and the court, the court noted (1) Hudson and defense counsel had put "the prosecutor's feet to the fire to get ready for this," (2) the prosecutor had "gotten ready for the case, made dismissals as to certain charges . . . , and [had] witnesses ready to go," and (3) the court had called in 80 jurors. Finally, as to the fourth factor — whether substantial justice would be served by granting the motion — the court's statements that the issue "should have been explored long before" and the evidence would be "confusing" reveal the court considered the equities, particularly Hudson's failure to demonstrate he diligently tried to secure the attendance of an expert witness. (*People v. Lewis* (2006) 39 Cal.4th 970, 1036.) In sum, the court did not abuse its discretion by determining Hudson failed to show good cause for a continuance.

People v. Reyes (1997) 52 Cal.App.4th 975 (*Reyes*), upon which Hudson relies, is inapposite. There, the defendant "sought to introduce the testimony of a psychologist . . . to show he lacked knowledge the property was stolen . . . . During the offer of proof, [the psychologist] testified [the defendant] had a variety of mental

disorders, including schizophrenia and 'a paranoid, antisocial, and borderline style of personality disorder.'" (*Id.* at p. 981.) The trial court "disallowed the testimony, finding it went to 'diminished capacity,' an abolished defense." (*Ibid.*) The appellate court reversed, holding "that with regard to the element of knowledge, receiving stolen property is a 'specific intent crime.'" (*Id.* at p. 985.) Thus, evidence of mental illness was admissible on the issue of whether the defendant formed the required specific intent pursuant to section 28, subdivision (a), which permits mental illness evidence to be admitted solely on the issue of whether a defendant formed a required specific intent, when a specific intent crime is charged.

But *Reyes* did *not* involve a motion for a continuance. Rather, in *Reyes*, a psychologist was present and ready to testify. Here, Hudson "could not show that he had been diligent in securing an expert witness's attendance," or that a doctor would be available within a reasonable time to give testimony "material and helpful to the defense." (*People v. Howard* (1992) 1 Cal.4th 1132, 1172.) Hudson argues his motion was timely because he did not learn until the day of trial he would need an expert witness in lieu of his mother. But Hudson had ample opportunity — three months — to discuss with his counsel his plan to have his mother testify as to his manic depression. He did not. The court's denial of his continuance motion was not an abuse of discretion.

The Court Did Not Coerce the Jury's Verdict

Hudson contends the court "impermissibly coerced a verdict after repeatedly ordering the jury . . . to continue deliberating" and thereby deprived him of due process of law. He asserts "the jury repeatedly and consistently informed the court they were 'hopelessly deadlocked,'" the court knew the jury was divided eleven to one in favor of conviction, and "the court's repeated orders to continue deliberating under these circumstances were coercive and effectively encouraged the jury to return a guilty verdict."

During its deliberations, the jury contacted the judge several times. On the second day, the jurors requested a dictionary (which request was refused), advised the court they were deadlocked eleven to one in favor of convicting Hudson, and asked for "some guidance on how to move forward." Outside the jury's presence, the court informed counsel of this development but did not divulge the jury's numerical division. The jury was then brought in, and with both counsel's concurrence, the court reminded the jurors they were not to disclose to anyone any numerical divisions in balloting, and reread them CALJIC No. 17.40 which states, inter alia: "The People and the defendant are entitled to the individual opinion of each juror. [¶] . . . [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." The court then ordered the jury to continue deliberations, but to inform the court if they felt hopelessly deadlocked.

About one hour and a half later, the jury advised the bailiff they were hopelessly deadlocked, but when the jurors were brought before the court, the foreperson informed the court she did not believe they were deadlocked. After further deliberations the next morning (and sending the court a note asking whether receiving stolen property required the defendant to have stolen the property), the jury informed the court they were deadlocked. The court met with the jury in open court and asked the foreperson to state the current numerical split in voting without specifying how many votes were for acquittal versus conviction. The foreperson responded eleven to one. The court asked each juror individually whether he or she felt the court could do anything to help them reach a verdict. Jurors 1, 2, 4, 5, 6, 7, 10, 11, and 12 believed the jury was deadlocked. Juror 3, the foreperson, felt further clarification would be helpful on whether the charge required the defendant to have stolen the property. Juror 9 stated there was "confusion as to what we can do and in what order." Juror 8 felt the second lesser charge of attempted receiving stolen property might have caused confusion and believed there was "a small

chance" the court's reinstructing on the lesser charge might assist the jury in reaching a verdict. Juror 6 nodded her head in agreement. Juror 3 asked the court to define "attempt," and juror 8 felt discarding the lesser charge would help. The court then stated it had heard enough to conclude there was a reasonable probability the jury could reach a verdict, but advised the jury to send a note if they still felt they were hopelessly deadlocked. The jury left for lunch at this point. To the attorneys the court stated the jurors seemed "confused on a lesser" and decided to reread the jury instructions on "attempt," as well as the elements of receiving stolen property and CALJIC Nos. 17.10 and 17.49 on lesser crimes. Defense counsel moved for a mistrial, arguing this was the third time the jury had stated they were deadlocked. The court denied the motion. After the jurors returned from lunch, the court reinstructed them on receiving stolen property, attempt, unanimity of verdict, attempted receiving stolen property, multiple verdict forms, and reasonable doubt. The jury left for further deliberations and subsequently reached its verdict. In total, the jury deliberated less than nine hours.

Section 1140 permits a court to discharge a jury in a criminal proceeding before it reaches a verdict if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." "The determination, pursuant to section 1140, whether there is a '"reasonable probability"' of agreement, rests within the sound discretion of the trial court. [Citation.] Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived '"as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered."'" (*People v. Proctor* (1992) 4 Cal.4th 499, 539.) "'[T]he practice of inquiring into the jury's numerical division, without finding out how many are for conviction and how many for acquittal, [has been]

expressly approved . . . .'" (*Id.* at p. 538.) A court's knowledge that "a single holdout juror favor[s] acquittal," is *not* "inherently coercive," although there exists "a *potential* for coercion," such as where a judge makes "remarks to the deadlocked jury regarding the clarity of the evidence, the simplicity of the case, the necessity of reaching a unanimous verdict, or even the threat of being 'locked up for the night.'" (*People v. Sheldon* (1989) 48 Cal.3d 935, 959-960; see also *People v. Pride* (1992) 3 Cal.4th 195, 265-266 [court did not abuse discretion by refusing to discharge jury after learning of 11-to-1 vote favoring death sentence].)

Applying the foregoing principles, we conclude the court did not abuse its discretion by ordering the jury to continue deliberations. Nothing in the record suggests the court implicitly coerced the holdout juror; in fact, the court reinstructed the jury on the importance of each juror's individual opinion. Nor did the court imply a verdict was required; rather, the court advised the jury to inform the court if the jurors felt hopelessly deadlocked. At each impasse, based on individual jurors' statements that further instruction might help their understanding of the case, the court properly decided a reasonable probability existed the jurors might yet reach agreement.

Hudson relies on *People v. Crossland* (1960) 182 Cal.App.2d 117, where an appellate court reversed the defendant's conviction for being a felon in possession of a gun. The appellate court found the trial court's "insistence upon further deliberation by the jury, coupled with statements that the case is clear or simple, constitute[d] coercion of the jury . . . ." (*Id.* at p. 119.) The trial court, "after stating that 'this situation . . . sort of baffles me,' [had] said: 'What's the problem? I don't want you to say who said what, but let's get at it here. If I may say, this is probably the most simple case I have ever tried in my twelve years as a Superior Court Judge, and I have heard over a thousand trials. What's the point?'" (*Id.* at p. 118.)

Here, in contrast, the court never stated or implied the case was simple. Rather, the court told the jurors they had not deliberated long for a criminal case and that

"deliberations are not easy," thus recognizing the case presented potentially difficult legal issues. (On appeal Hudson stresses the trial was short and asserts the issues were simple, but fails to acknowledge the obvious difficulty the jury faced with elements of the charged and lesser offenses.)

Finally, Hudson complains the court sent the jury back for further deliberations not just once, but three times. But a court may order a jury more than once to continue deliberations so long as it discerns a reasonable probability the jurors may reach agreement. (*People v. Breaux* (1991) 1 Cal.4th 281, 319-320; *People v. Harris* (2005) 37 Cal.4th 310, 363.) Here, the court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.